

Before the
Federal Communications Commission
Washington, DC 20554

BELLSOUTH
TELECOMMUNICATIONS, LLC
d/b/a AT&T NORTH CAROLINA and
d/b/a AT&T SOUTH CAROLINA,

Complainant,

v.

DUKE ENERGY PROGRESS, LLC,

Defendant.

Proceeding No. 20-293
Bureau ID No. EB-20-MD-004

JOINT STATEMENT

Pursuant to 47 C.F.R. § 1.733(b)(2) and the Commission’s September 22, 2020 Notice of Complaint, Complainant BellSouth Telecommunications, LLC d/b/a AT&T North Carolina and d/b/a AT&T South Carolina (“AT&T”) and Defendant Duke Energy Progress, LLC (“Duke Progress”), through undersigned counsel, submit the following Joint Statement regarding (I) stipulated facts, (II) disputed facts, (III) key legal issues, (IV) discovery matters, (V) scheduling, and (VI) settlement prospects.

I. Stipulated Facts¹

1. AT&T is an incumbent local exchange carrier (“ILEC”) that provides telecommunications and other services in areas of North Carolina and South Carolina.

¹ The parties’ stipulation to a fact does not mean the parties agree that the stipulated fact is relevant or material to any issue in this proceeding—only that the stated fact is uncontroverted. The parties stipulate to facts for purposes of this proceeding only.

2. Duke Progress is an investor-owned electric utility that provides electric and other services within the states of North Carolina and South Carolina. Duke Progress owns poles in North Carolina and South Carolina that are used for wire communications. Duke Progress is not owned by a railroad, a person who is cooperatively organized, or a person owned by the Federal Government or a State.

3. AT&T and Duke Progress are parties to a Joint Use Agreement between Carolina Power & Light Company and BellSouth Telecommunications, Inc. that was executed in 2000, with an effective date of January 1, 2001 (the “JUA”).² The cover of the JUA states that the JUA is applicable to the payment of rentals for 1997 and thereafter.³ The parties regularly update JUA Exhibits B and D as permitted in Article VII.K of the JUA.⁴

4. When the JUA was executed in 2000 and continuing until today, Duke Progress has owned the majority of the jointly used poles.

5. A 1987 document that predates the JUA states that AT&T then owned 41,509 (25%) of the jointly used poles and Duke Progress then owned 125,067 (75%) of the jointly used poles.⁵

6. Prior to the JUA, predecessors of AT&T and Duke Progress were parties to an Agreement Covering Joint Use of Poles between Carolina Power & Light Company and Southern Bell Telephone and Telegraph Company dated September 29, 1977 (the “1977 JUA”).⁶

² See Compl. Ex. 1 at ATT00091-110; Answer Ex. 1 at DEP000116-136 (JUA, with updated cost schedules).

³ See Compl. Ex. 1 at ATT00091; Answer Ex. 1 at DEP000116.

⁴ See Compl. Ex. 1 at ATT00099-100; Answer Ex. 1 at DEP000125-126.

⁵ See Compl. Ex. 7 at ATT00201-202.

⁶ See Answer Ex. 2 at DEP000138-167.

7. Currently, Duke Progress and AT&T share approximately 178,662 utility poles in North and South Carolina. AT&T owns approximately 30,598 (17%) of the jointly used poles and Duke Progress owns approximately 148,064 (83%) of the jointly used poles.⁷

8. Neither party has given notice of termination of the JUA pursuant to Article XVII.

9. A termination under Article XVII applies only to the “right to make additional Attachments” and Article XVII states that “[a]ny such termination ... shall not, however, abrogate or terminate the right of either party to maintain the existing Attachments on the poles of the other and all such existing Attachments shall continue pursuant to and in accordance with the terms of the Agreement.”⁸

10. Article I.K of the JUA defines “STANDARD JOINT USE POLES” as “A 40-foot pole which meets the requirements of the Code for support and clearance of electric supply and communications conductors now or hereafter used by either party in the conduct of its business.”⁹ Article I.K of the JUA further states that “[t]his definition of a Standard Joint Use Pole is not intended to preclude the use of joint poles shorter than the Standard Joint Use Pole in locations where such poles will meet the known or anticipated requirements of the parties.”¹⁰

11. Article III.A of the JUA provides: “[Duke Progress’s] use of space below [AT&T] shall be limited to vertical Attachments unless agreed to by the field representatives and provided all applicable code requirements are met.”¹¹

⁷ See Reply Ex. M-1 at ATT00383-384 (2020 Invoices dated Dec. 7, 2020).

⁸ See Compl. Ex. 1 at ATT00104; Answer Ex. 1 at DEP000130.

⁹ See Compl. Ex. 1 at ATT00094; Answer Ex. 1 at DEP000120.

¹⁰ See Compl. Ex. 1 at ATT00094; Answer Ex. 1 at DEP000120.

¹¹ See Compl. Ex. 1 at ATT00095; Answer Ex. 1 at DEP000121.

12. Article XIII of the JUA contains the methodology for determining the “rental rate for Attachments under this Agreement.”¹²

13. Under Article XIII of the JUA, a party’s annual “rental rate” is “adjusted annually by the percentage as calculated by dividing the current year July Index rate by the previous year July Index rate. The values used in determining this percentage are as shown in the Handy Whitman Index in category FERC Account 364.”¹³

14. Under Article XIII of the JUA, “[t]he annual payments due from each party as Licensees shall be compared” and “the party which [is] due the greater amount” issues an annual net rental invoice.¹⁴ Duke Progress has always been “the party which [is] due the greater amount.”

15. For the 2017 through 2019 rental years, prior to issuing invoices for annual rental payments, Duke Progress sent to AT&T the annual “rental rates” as calculated under Article XIII of the JUA.

16. For the 2017 through 2019 rental years, AT&T returned to Duke Progress a “Schedule of Pole Rental” referred to as a “Form 6407,” which “certif[ied] that we now have attachments on the total number of poles as shown below, at the rentals and under the terms and conditions of the AGREEMENT FOR JOINT USE OF POLES.”¹⁵

17. For the 2017 through 2019 rental years, Duke Progress, after receipt of the Form 6407 from AT&T, invoiced the following per-pole rates:

¹² See Compl. Ex. 1 at ATT00102-103; Answer Ex. 1 at DEP000128-129.

¹³ See Compl. Ex. 1 at ATT00102; Answer Ex. 1 at DEP000128.

¹⁴ See Compl. Ex. 1 at ATT00102; Answer Ex. 1 at DEP000128.

¹⁵ See Answer Ex. A-3 at DEP000269-280.

	2017	2018	2019
Rate for AT&T's use of Duke Progress's poles	██████	██████	██████
Rate for Duke Progress's use of AT&T's poles	██████	██████	██████

18. For the 2017 through 2019 rental years, Duke Progress calculated the annual pole attachment charges as follows:

	AT&T's Rent to Duke Energy Progress		-	Duke Energy Progress's Rent to AT&T		=	Net Rent
Rental Year	Per-Pole Rate for AT&T's Use of Duke Energy Progress's Poles	x Duke Energy Progress Poles	-	Per-Pole Rate for Duke Energy Progress's Use of AT&T's Poles	x AT&T Poles	=	Net Rent Paid by AT&T
2017	\$██████	148,064		\$██████	30,598		\$██████
2018	\$██████	148,064		\$██████	30,598		\$██████
2019	\$██████	148,064		\$██████	30,598		\$██████

19. AT&T paid Duke Progress's invoices in full for the 2017 through 2019 rental years.

20. The net rentals invoiced for the 2017 – 2019 rental years were properly calculated under the rate formula in the JUA.

21. Duke Progress has agreements with █████ cable companies, █████ CLECs, and █████ wireless providers. There are approximately 480,481 non-ILEC attachments on Duke Progress's poles. Duke Progress charged cable companies and CLECs █████ pole attachment rates for the 2017 through 2019 rental years, respectively.¹⁶

¹⁶ Duke Progress's Resp. to Interrogatories, Ex. 1 at DEP000001-5.

22. In a letter dated May 22, 2019, AT&T requested a meeting with Duke Progress's executives "to discuss the pole attachment rental rates that [AT&T] should be paying to attach to poles covered by the ... 2000 [JUA]." ¹⁷

23. The parties met on July 2, 2019 at Duke Energy Corporation's offices in Raleigh, North Carolina. Attending the meeting for AT&T were Dianne Miller, Director – Construction & Engineering with responsibility for AT&T's National Joint Utility Team; Mark Peters, Area Manager – Regulatory Relations; and Daniel Rhinehart, Director – Regulatory. Attending the meeting for Duke Progress were Scott Freeburn, Joint Use Manager; and David Hatcher, Managing Director Infrastructure Solutions.

24. Following the July 2, 2019 meeting, Duke Progress and AT&T exchanged certain cost data related to utility poles. Duke Progress also provided a document titled "Telecommunications Pole Attachment License Agreement Between Duke Energy Progress, LLC and ____." ¹⁸

25. In a letter dated September 5, 2019, AT&T requested "a follow-up meeting with the hope of reaching a negotiated resolution." ¹⁹

26. The parties met on October 24, 2019 at Duke Energy Corporation's offices in Raleigh, North Carolina. Ms. Miller, Mr. Peters, and Mr. Rhinehart attended the meeting for AT&T. Mr. Freeburn and Mr. Hatcher attended the meeting for Duke Progress, with Andy Russell, Project Manager, and Greg Fields, Managing Director Connected Communities.

27. The parties did not resolve the dispute at the October 24, 2019 meeting.

¹⁷ Compl. Ex. 8 at ATT00204-205.

¹⁸ Compl. Ex. 2 at ATT00112-53.

¹⁹ Compl. Ex. 10 at ATT00211; Answer Ex. 3 at DEP000169.

28. On November 7, 2019, Mr. Freeburn sent an email to Ms. Dianne Miller stating that Duke Progress “wanted the opportunity to submit a new rate proposal.”²⁰

29. In 2019 and through February 18, 2020, the parties exchanged additional correspondence and spoke by phone.²¹ AT&T filed its pole attachment complaint on September 1, 2020.

30. On September 10, 2020, Duke Progress made a settlement proposal to AT&T (which also proposed resolution of a separate dispute between AT&T and Duke Energy Florida, LLC).²²

31. As of the date of this Joint Statement, AT&T has not made a counteroffer to Duke Progress, but the parties have agreed to resume settlement negotiations following its filing.

II. Disputed Facts

All facts from the parties’ pleadings that are not stipulated above are disputed.

III. Key Legal Issues²³

1. Are the joint use agreement rates for AT&T’s use of Duke Progress’s poles just and reasonable under 47 U.S.C. § 224(b), the Commission’s regulations and orders, and other applicable law?

- (a) Do the presumptions in 47 C.F.R. § 1.1413(b) apply?
- (b) If the presumptions apply, did Duke Progress meet its burden to rebut the presumptions under the standard in 47 C.F.R. § 1.1413(b) and the Commission’s 2018 *Third Report and Order*?

²⁰ Compl. Ex. 12 at ATT00217.

²¹ Compl. Exs. 13-17 at ATT00219-232.

²² Answer Ex. 4 at DEP000171-176.

²³ The inclusion of an issue in this list does not mean the parties agree that the issue is unsettled.

- (c) If the presumptions do not apply, has AT&T established that the joint use agreement rates are unjust and unreasonable under the standard adopted in the Commission's 2011 *Pole Attachment Order*?
- 2. If the joint use agreement rates for AT&T's use of Duke Progress's poles are not just and reasonable, what is the just and reasonable rate?
 - (a) If the just and reasonable rate is the new telecom rate, what are the inputs used in the new telecom rate formula and how is it calculated?
 - (b) If the old telecom rate is a "reference point" or a "hard cap," what are the inputs used in the old telecom rate formula?
 - (c) If the just and reasonable rate is determined by some other formula or methodology, what is the formula or methodology and what are the inputs?
 - (d) Under either the new telecom rate formula or the old telecom rate formula, should the "safety space" on Duke Progress's poles be allocated to AT&T?
- 3. Is a refund available to AT&T under 47 C.F.R. § 1.1407(a)(3)?
 - (a) If refunds are awarded, what is the applicable statute of limitations under 47 C.F.R. § 1.1407(a)(3)?
 - (b) If refunds are awarded, for what rental years, based on what rental rate formula, and in what amount?
 - (c) Is AT&T estopped from claiming a refund for periods prior to May 22, 2019?

IV. **Discovery**

The parties are currently discussing supplemental responses to the parties' interrogatories that would eliminate the need for discovery motion practice. The parties' outstanding discovery issues fall within the following three categories:

- 1. Duke Progress has committed to providing AT&T the following information:
 - a complete set of Duke Progress's agreements with cable companies, CLECs, and wireless providers,

- all data related to “field surveys performed on 1,039 DEP poles to which AT&T is attached ... as part of the third-party pole attachment process,”²⁴ and
- all data related to a 2017 VentureSum inventory of Duke Progress’s poles.²⁵

2. Duke Progress is presently assessing AT&T’s request for the following information:

- support for Duke Progress’s alleged “average wood pole replacement cost for the year ending 2019,”²⁶ and
- support for Duke Progress’s alleged “cost[s] for constructing new pole lines within DEP’s service area.”²⁷

3. AT&T is presently assessing Duke Progress’s request for the following information:

- information concerning the methodology by which AT&T calculates rates for wireless providers attached to its poles,²⁸
- information concerning “size and type of pole(s) does AT&T set when such pole(s) will not be jointly used with DEP or another electric utility pursuant to a Joint Use Agreement” and “the costs incurred by AT&T in the preceding 5 years to construct non-joint use pole lines (including the cost of installing AT&T’s communication facilities),”²⁹ and
- the number of jointly used poles owned by Duke Progress that AT&T paid to replace at the time AT&T made its initial attachment.³⁰

²⁴ Answer Ex. A at DEP000250-251 (Freeburn Decl. ¶¶ 13-15).

²⁵ Answer Ex. A at DEP000260 (Freeburn Decl. ¶ 34).

²⁶ Answer Ex. A at DEP000256, DEP000260 (Freeburn Decl. ¶¶ 24-25, 35).

²⁷ Answer Ex. A at DEP000260-261 (Freeburn Decl. ¶ 36).

²⁸ Duke Progress Interrogatory #4.

²⁹ Duke Progress Interrogatory #7.

³⁰ Duke Progress Interrogatory # 10.

To the extent either party decides to stand on its prior objections with respect to the information listed in categories 2 and 3, or Duke Progress fails to provide the information identified in category 1, the parties agree that any motions to compel will be filed by January 29, 2021.

V. Schedule for Pleadings

To the extent the Commission believes additional briefing on a particular issue or issues would be helpful to its understanding of this case under 47 C.F.R. § 1.732(a), the September 22, 2020 Notice of Complaint sets March 1, 2021 as the deadline for all briefing.

VI. Settlement

The parties are open to settlement and have agreed to resume negotiations following the filing of this Joint Statement.

Dated: January 8, 2021

Respectfully and jointly submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 8, 2021, I caused a copy of the foregoing Joint Statement to be served on the following (service method indicated):

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